(22)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 405-6

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

J. MARSHALL PEER AND W. D. WITTER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC.,
AND HARRY FOOTE, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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BRIEF OF RESPONDENTS IN OPPOSITION.

STATEMENT OF FACTS.

The facts stated by petitioners involve so many imperfections and omissions that we deem it necessary to outline the facts appearing of record herein.

1. There had been a voluntary petition filed in the District Court July 23, 1936 under Section 77-B of the Bank-

ruptcy Act in the name of Peer Manor Building Corporation representing itself to be an Illinois corporation (Tr. 29-30). This petition resulted in the confirmation of a reorganization plan whereby the first mortgage indebtedness was extended to mature on November 28, 1941. In the final decree that was entered therein jurisdiction was reserved to enter any decrees necessary to enforce the plan (Tr. 31-47).

2. On expiration of the extended period a default occurred and on December 5, 1941 the respondents herein, all being creditors, and the Heitman Trust Company, Indenture Trustee, under the first mortgage trust deed, which was the subject of the extension, jointly filed a petition in the above mentioned suit under the provisions of Section 127, Chapter X of the Bankruptcy Act. This petition alleged the default and sought a further reorganization under that Chapter (Tr. 47-54). The court approved this petition and appointed a trustee (Tr. 55-60). The record does not show that any one sought the appointment of the trustee.

This order was appealed from and reversed by the Seventh Circuit Court of Appeals, 134 Fed. (2d) 839. That court held that there was not a pending proceeding within the meaning of Section 127 of Chapter X of the Bankruptcy Act, and that hence the petition could not be considered as filed in a pending proceeding, but must be considered as a new petition, and hence there was no jurisdiction established under Section 127 of Chapter X of the Bankruptcy Act. The court held further that this petition could not prevail as a new petition because it was directed to a corporation which no longer existed, having been dissolved more than two years by decree of a court prior to the time of filing the petition, and that under the law of Illinois a corporation was termi-

nated for all purposes two years after a decree of dissolution, and that hence there was no entity before the court to be reorganized, and that, therefore, there was no jurisdiction of the court. The court by way of dicta stated a great many things not here relevant. Afterwards a petition for certiorari was denied by this court and the Circuit Court of Appeals filed its mandate on June 28, 1943 ordering the petition dismissed and assessing costs against "the appellees, G. J. Nikolas, G. J. Nikolas & Co., Inc., et al." A bill of costs was filed with the mandate and was paid (these costs are no part of this controversy).

3. On July 9, 1943 Witter, petitioner herein, moved in the District Court for a judgment of dismissal on the mandate and for a Rule on the Trustee to account. On the same day the trustee, Hummell, petitioned the court for an order on Peer, his agent, to turn over to him the moneys that Peer had collected, as such agent. Peer sought and obtained leave to answer the trustee's petition. Judgment for costs was entered that day (these are not the costs herein in issue). The matter was continued to July 22, 1944, apparently to afford Peer an opportunity to answer (Tr. 7).

4. On July 22, 1943 the court entered an order dismissing the petition pursuant to the mandate, continuing the hearing on the petition of the trustee and the answer of Peer to August 25, 1943 to be heard before Judge Barnes (the Judge who had heard the case originally), and ordering the trustee to file his report and account in 20 days, and setting the hearing on the trustee's reports for August 25, 1943, and ordering the trustee to collect the rents for August, same to be held subject to further order of the court after the hearing on August 25, 1943 (Tr. 9).

On July 28, 1943 Peer filed a motion to vacate all of the order of July 25, 1943, except that part dismissing the petition (Tr. 10). This motion was continued to August 25, 1943 (Tr. 11).

5. On August 25, 1943 the court heard the petition of the trustee to compel Peer to account, and found that Peer had collected income totaling $7,033.40 while acting for the trustee, and ordered Peer to deliver this sum to the trustee together with any other rents collected by him from the building operated by the trustee, the moneys to be held by the trustee pending determination and order of disposition by the court (Tr. 11-12). Notice of appeal from this order was filed October 19, 1943 (Tr. 16-17) (56 days after the entry of the order).

6. The petition of Peer to vacate the order of July 22, 1943 and the final report of the trustee came on for hearing September 21, 1943 on which date the court entered an order approving the trustee's report and denying the motion of Peer to vacate part of the order of July 22, 1943, fixing fees of the trustee and his counsel and ordering the trustee to reimburse himself for the balance of fees allowed and to pay to his counsel the balance of counsel fees, allowed from funds in his hands and to pay over to the Indenture Trustee the balance of the moneys held by the court's trustee, subject to unknown operating liabilities and taxes claimed against the trustee, if any, and directed the trustees to assign to the Indenture Trustee his claim against Peer for rents under the order of August 25, 1943, and to assign any other claims against Peer which he had for rents. The trustee was ordered discharged upon the filing of a supplement to his final report showing performance by him of the commands of this order (Tr. 14-16). This order was also appealed on October 19, 1943 by Peer.

Witter who now joins in the petition for certiorari did not join in the appeal from the order of August 25, 1943, or from the order of September 21, 1943 (Tr. 16-17).

7. On September 23, 1943 the court entered an order reciting that the court was advised that by virture of the mandate of the Circuit Court of Appeals "all costs should be taxed against the petitioning creditors, G. J. Nikolas, G. J. Nikolas & Company, Inc., and Harry Foote," and further recited the fees allowed to the trustee and his counsel and found them reasonable, and ordered that these fees aggregating $4250.00, and a printing bill of $75.00 all totaling $4325.00 "be and they are hereby taxed as costs against the petitioning creditors." The order thereupon directed that judgment enter against these respondents, G. J. Nikolas, G. J. Nikolas & Company, Inc., and Harry Foote in the amount of $4325.00, and execution to issue (Tr. 69-70). These respondents appealed from the last named order on October 22, 1943 (Tr. 71).

8. The Circuit Court of Appeals affirmed the order of August 25, 1943 requiring Peer to account and affirmed the order of September 21, 1943 denying the motion of Peer to vacate the order of July 22 in part and allowing fees to the trustee and his counsel, and directing them to be paid from funds in the hands of the trustee (Tr. 89). It modified the order of September 21, 1943 to eliminate the judgment against these respondents for "costs" and directed that the administrative expenses be paid out of moneys on hand (Tr. 90).

ARGUMENT.

These respondents are defending the order of the United States Circuit Court of Appeals sustaining the District Court's orders of August 25, 1943 and that part of the District Court's order of September 21, 1943 which denied the motion of Peer to vacate the order of July 22, 1943 in part, and are defending the order of the United States Circuit Court of Appeals modifying the order of September 23, 1943.

We are not defending that part of the order of the Circuit Court of Appeals which affirms that part of the order of September 21, 1943 which allowed fees to the trustee and to his counsel. We alone opposed that part of the order in the District Court and hence are not in a position to defend it here. However, we wish to call to the court's attention that the beneficiaries of that order were the trustee and his counsel. They are the proper parties respondent to that phase of this petition for certiorari. Neither of them have been made respondents either in the Circuit Court of Appeals nor in this court and the record does not disclose that they have had notice of this proceeding on appeal.

I.

The order of July 22, 1943 was within the jurisdiction of the court and hence the motion to vacate was properly denied.

The mandate of the Circuit Court of Appeals was to dismiss the petition for want of jurisdiction because

there was no pending case within the meaning of Section 127 of Chapter X of the Bankruptcy Act, and because there was no party respondent before the court (See opinion 134 Fed. (2nd) 839).

Certainly the mandate to dismiss could not have meant that the District Court should dismiss the cause and leave the court's officer in possession of a building and a large sum of money without accounting and without order of disposition. As an incident to the dismissal the court had a duty to divest itself of what it had taken without jurisdiction. To do this it was necessary to require an accounting of its officer. When the mandate was presented to the court on July 9, 1943 Peer already held moneys he had collected as the agent of the trustee, the amount he had refused to disclose and account for. Had he properly accounted the court would likely have disposed of the matter on that day by dismissing the petition and directing its officers as to their manner of divesting themselves of the property and money they held, but Peer who now complains of the failure to dismiss on that day then sought delay; he asked leave to answer the trustee's petition. When that answer came before the court the petition was dismissed.

Witter recognized the duty of the District Court when he presented the mandate, as he moved at that time for rule on the trustee to file his final report and account (Tr. 6).

We concede that a court of the first instance acting on a mandate finding a lack of jurisdiction and directing a dismissal of the cause for such lack can only enter orders incident to dismissal and has no right to adjudicate any new matter. We submit, however, that the action of the District Court in so far as it was con-

fined to compelling its officers and their agents to account and turn over funds that had been obtained by them was not adjudication of any new matter, but was a proper action on the part of the District Court incident to carrying out the mandate for dismissal, and was necessary to divesting itself of moneys and property it had taken, and which, according to the judgment of the Appellate Court, it had no authority to take. It was an effort on the part of the court to correct its own orders in accordance with the mandate. That a court may enter such orders after having been reversed for lack of jurisdiction, but may not take any new affirmative action is established by the opinion of this court in *Northwestern Fuel Co.* v. *Brock,* 11 Sup. Ct. 523, 524; 139 U.S. 216.

II.

AUG

The order of ~~July~~ 25, 1943 was not appealed from within the time provided by law.

For another reason, the petition for certiorari should be denied, in so far as it applies to the order of August 25, 1943, which order directed Peer to account and turn over moneys, inasmuch as this order was not appealed from until the 19th day of October, 1943 (Tr. 16-17), which date was 56 days after the entry of the order.

The jurisdiction of the Circuit Court of Appeals to review an order entered in the bankruptcy court is derived from Section 24 of the Bankruptcy Ast as amended (Sec. 47, Title 11, U.S.C.A.), Sec. 25 (a), (Sec. 48 (a), Title 11, U.S.C.A.) which unequivocally fixes a limitation of the time in which that jurisdiction may be invoked; that time is fixed at "thirty days after written notice to the aggrieved party of the entry of the judgment,

order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry." The record does not show whether written notice was served, but by either test this appeal was not taken to the Circuit Court of Appeals within the time limit fixed by the statute, it being 56 days after the entry of the order. Whether the District Court had jurisdiction to enter that order or not the Circuit Court of Appeals was wholly without jurisdiction to review the order on the appeal taken more than 40 days after its entry. If the order was void it could be disregarded. If it was voidable the parties by their failure to appeal it within the statutory period permitted it to become final and binding. *In re Country Club Bldg. Corporation,* 128 Fed. (2d) 36-37, C.C.A. 7.

This same statute before being amended to its present form contained a similar provision limiting the time of taking appeals to 30 days after judgment. The courts have consistently construed this limitation to be binding and have held appeals not taken within the statutory period invalid. *Clements* v. *Conyers,* 31 Fed. (2d) 563, 564, *In re Fox West Coast Theatres,* 88 Fed. (2d) 212, 221, C.C.A. 9, *In re Interstate Oil Corporation,* 63 Fed. (2d) 674, 675, C.C.A. 9, *Shreiner, et al* v. *Farmers' Trust Co. of Lancaster,* 91 Fed. (2d) 606, 607, C.C.A. 3, *Broders* v. *Lage,* 25 Fed. (2d) 288, 290, C.C.A. 8.

The Fifth Circuit Court of Appeals held in *Vaughan* v. *American Ins. Co. of Newark, N.J.,* 15 Fed. (2d) 526, 527, C.C.A. 5, on page 527 that it was a well settled principle "that statutes limiting the time in which appeals and writs of error may be brought are mandatory and jurisdictional." Acting on another statute this court applied the same principle in *Old Nick Williams Co.* v.

United States, 30 Sup. Ct. 221 (215 U.S. 541) where this court stated on page 223, Sup. Ct. edition:

> "The delay in the present case in taking out the writ of error was not the act of the court, but of petitioner. At all events, petitioner might have brought its writ of error within the time prescribed by statute, *and the court had no power to allow it after the time limited had expired.*" (Italics ours.)

This court applied the same doctrine in the case of *Credit Co., Limited* v. *Arkansas Cent. Ry. Co., et al.,* 9 Sup. Ct. 107 (128 U.S. 258), in which the court dismissed an appeal brought after the time for filing same had expired.

The jurisdiction of the Circuit Court of Appeals to review, affirm, revise or reverse derived from Sec. 47, Title 11 U.S.C.A. by its terms applies to orders which are "either interlocutory or final," and sub-paragraph b of this same section says, "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

It, therefore, seems clear to us that there was no jurisdiction in the Circuit Court of Appeals to review the order of August 25, 1943, but since the court did not alter, modify or revise that order in any manner the petition to review its action thereon should be denied.

III.

The order of the District Court entered September 23, 1943 assessing "costs" was not a proper order under the mandate of the United States Circuit Court of Appeals.

The order of September 23, recited " 'that by virtue of the mandate of the Circuit Court of Appeals direct-

ing this court to dismiss the instant proceeding, all costs should be taxed against the petitioning creditors, G. J. Nikolas, G. J. Nikolas & Company, Inc., and Harry Foote' " (Tr. 69).

An examination of the mandate (Tr. 64-66) does not disclose authority for any such order. The mandate provided that Witter recover against "the appellees G. J. Nikolas, G. J. Nikolas & Company, Inc., et. al. the sum of $206.88 for costs herein expended with direction," and there was annexed to this mandate a bill of costs aggregating $206.88 (Tr. 65-66). This was pursuant to Rule 24 of the Circuit Court of Appeals for the Seventh Circuit. It was proper for the District Court to enter a judgment on this mandate for the costs therein taxed. Such a judgment was entered when the mandate was presented to the District Court on July 9, 1943 (Tr. 7). (These costs are not any part of the judgment appealed from. They have been satisfied.)

The "et al" in the mandate refers to and includes Harry Foote and Heitman Trust Company, Indenture Trustees. The Heitman Trust Company was just as much an appellee and was just as much a petitioner as were any other parties. The petition which the court was acting upon was filed jointly by the Heitman Trust Company and the respondents herein. The petition appears on pages 21 to 28 of the transcript. See also notice of appeal (Tr. 37) and also the first paragraph of the order which was appealed from and which was the order reversed by the mandate (Tr. 29). All of these show the Heitman Trust Company as Indenture Trustee participating as a party petitioner and as a party appellee. The Circuit Court of Appeals did not distinguish between appellees, but included them all in its mandate equally. The District Court pretending to obey the man-

date selected some of the appellees and entered its judgment against them and made that judgment run in behalf of another appellee against whom the Appellate Court had taxed the real costs along with these respondents.

This failure on the part of the District Court to observe the provisions of the mandate is sufficient answer to the argument of petitioners that the Appellate Court was bound by its mandate and could not disturb the action of the District Court. Certainly the Appellate Court on a proper appeal presented could determine whether or not the District Court had correctly construed its mandate and this is all that the Appellate Court did in this case.

Certainly there could be no excuse for the District Court, under the guise of obeying the mandate, to select certain of the parties against whom the Appellate Court had assessed costs and direct that they pay the costs to another party against whom the Appellate Court had assessed the costs jointly.

IV.

The respondents herein were not the original petitioners but were interveners in a pending proceeding. Their intervention was in good faith relying on existing decisions of the Court of Appeals.

The District Court refers to these respondents as petitioning creditors (Tr. 69-70).

The record shows that these proceedings were initiated by a voluntary petition, and that one of the very parties who are here asking for certiorari was one of the initiators of the proceedings (Tr. 28-30). It shows

that these respondents came into the proceedings first by way of intervention (Tr. 31). It also shows that the petition filed by these respondents jointly with Heitman Trust Company was filed by them in the existing proceeding which demonstrates that their purpose was to file it under Sec. 127 of Chapter X of the Bankruptcy Act as an intervention in a pending proceeding (Tr. 47). It is true that the reviewing court held (134 Fed. (2d) 839) that there was not a pending proceeding within the meaning of Sec. 127.

We are aware that there are cases in bankruptcy where costs of receivership are taxed against petitioning creditors who had filed petitions for the purpose of harassing the debtor, or had made fraudulent concealments, or misled the court in some way, or had improvidently or fraudulently induced a preadjudication appointment of a receiver, or a preadjudication seizure of property. These cases have no application to the case here before the court. The manner in which these respondents came into the proceeding is significant, only from the standpoint that not being the initiators of the proceeding they did not have the burden of ascertaining whether there was in fact an existing corporation, constituting an entity under the laws of Illinois, which could be required to respond to process. They filed a petition in a proceeding in which the District Court had already held that it had jurisdiction of the debtor, and that holding had not been appealed from. In filing their petition they acted under the assumption that the court had sufficient jurisdiction to proceed under Chapter X of the Bankrupty Act, and the District Court held that it did have such jurisdiction. True, the District Court was reversed, but it would hardly seem equitable to penalize a creditor for seeking to enforce his rights in

the proceeding in which the court where his petition was filed conceived it to be a pending proceeding, where such creditor had nothing to do with bringing about a proceeding in the first instance. There is here no indication that the District Court was in any manner misled into approving the petition and appointing the trustee and incurring the expenses of trusteeship by any misrepresentation of these respondents, or by any negligence on their part in failing to bring before the court any matter that they had the duty to ascertain or disclose. They were bona fide creditors that owned bonds which were in default. They were later held to have misconceived their remedy, but in order to so hold the Circuit Court of Appeals found it necessary to reverse two of its prior decisions by express statement in its decision (*In re Peer Manor,* 134 Fed. (2d) 839). These two prior decisions were *In re 211 East Delaware Place Building Corporation,* 76 Fed. 2d, 834, and *In re Park Beach Hotel Building Corporation,* 96 Fed. 2d, 886. The court had the power and, if it was convinced that those decisions were wrong, it had the duty to reverse them, but until reversed parties litigant had a right to rely upon them. Those decisions had held that an involuntary petition would lie against a corporation for the purpose of reorganization under the bankruptcy laws notwithstanding that the two-year statute had run under the Illinois law. The rule for assessing receivership costs against a petitioning creditor is bottomed on the grounds that there should be discouraging penalties imposed on those who harassingly avail themselves of the processes of the bankruptcy court to seize property or interfere with the operation of a business without cause. Certainly justice could not permit such penalties to be visited on a litigant, who is pursuing remedies which the

courts have held proper and applicable when his claim is just and his cause a proper one, even though the court after his action is taken by reversal of its former stand holds the procedure he followed was improper. Such a ruling would oust the doctrine of *stare decisis* from the American system of jurisprudence, and would serve notice to all parties that they pursue their remedies at their peril lest some higher tribunal reverse its former position as to the procedure necessary to be followed.

V.

The fees of a trustee and trustee's counsel are not taxable as costs against creditors who filed a petition under Sec. 127 of Chapter X of the Bankruptcy Act in good faith, where the District Court found jurisdiction not withstanding that the District Court was reversed on appeal and held to be without jurisdiction for lack of pending cause or for failure to establish corporate existence of the debtor under state statute.

In the first place, the fees of a trustee and the trustee's counsel are not taxable as costs. Rule XXXIV of the Rules in Bankruptcy of the Supreme Court of the United States, provides that in cases of involuntary bankruptcy where the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, "the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a civil action cognizable as a case in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner."

This rule was construed by the District Court for the Southern District of New York in a case entitled, *In*

Re Ghiglione, 93 Fed. 186, 187. In that case, the court held that Sec. 3 (e) of the Bankruptcy Act, which provided for taxing counsel's fees, expenses and damages, where an involuntary petition was dismissed was inapplicable for the reason that it applied only to cases where an application is made to take charge of and to hold the property of an alleged bankrupt prior to adjudication. The court further held, "The allowance of 'counsel fees' in addition to costs can rest only on express statutory provision. It is contrary to the ordinary federal practice .***" The recovery of the counsel fees was there denied.

In the case of *In re Rome,* 162 Fed. 971, 974, the court refused to include counsel fees to the attorney for the successful party as costs in a bankruptcy proceeding on the grounds that there was no authorization in the statute for such inclusion. Both of these cases were cited with approval by the Second Circuit Court of Appeals in the case entitled, *In re Borok,* 50 Fed. 2d, 75, page 78 in which case the court concluded:

> "The appellee has advanced neither reason nor authority to sustain charging against the appellants counsel fees for the attorneys of the receiver and trustee. This was clearly error."

In the case of *McIntosh* v. *Ward,* 159 Fed. 66, the Seventh Circuit Court of Appeals held that it was not within the discretion of the court under the name of costs to require one party to pay to another items paid from the fund for services and expenses in administering the fund. The court says on page 69:

> "For depreciation under the receiver's care and management appellant was not responsible. So the court could not, on any principle of law or equity, give to appellees further damages for the merged

> wrongs and frauds by adding to the account the amount the court had been expending from the partnership fund for conserving and carrying on the partnership business."

That is precisely what the order of the District Court of September 25, 1943 sought to do in this case. The compensation to the trustee and his counsel constituted sums expended in conserving the estate before the court and carrying on the business.

In the second place, expenses of administration cannot be taxed against petitioning creditors in bankruptcy in the absence of an appointment of a receiver, or the preadjudication seizure of property.

In the case entitled, *In re National Carbon Co.,* 241 Fed. 330, C.C.A. 6, the court said on page 332:

> "There is, in express terms, no statutory authority for the awarding of trustees' compensation and attorney's fees against petitioning creditors."

The court analyzed this question at length and concluded that rules applicable to liability for expenses and damages in receivership cases are not pertinent to mere denials of petitions for adjudication of bankruptcy cases "not involving preliminary seizure of the debtor's property." The court in that case further concluded that if it be assumed that petitioning creditors may be required to respond in cases in which there was maliciousness or bad faith in the prosecution of a bankruptcy petition that the recovery cannot be had by summary proceeding. The court in that case held that there could be no recovery, and said on page 334:

> "*** but the alleged bankrupt was all the time confessedly subject to adjudication upon proper complaint, the petitioning creditors acted under a view of their legal rights which view the District Court

approved, and they did not proceed upon false allegations, or otherwise attempt to deceive that court."

The case is on all fours with the case at bar with the exception that the failure to sustain the jurisdiction in the Appellate Court in that case was estoppel due to the acts of the petitioning creditors themselves; whereas, in this case the failure was not due to any acts of the parties sought to be taxed with the expenses.

We have examined at length the cases cited by the petitioners herein where costs have been assessed against petitioning creditors including expenses, in every instance cited by the petitioners there was either a preadjudication seizure of property or a preadjudication appointment of a receiver, and none of the cases involved a trustee and his expenses. The reason for the distinction is patent. A receiver in a bankruptcy proceeding is appointed on the motion of the petitioners and without awaiting an adjudication of the rights of the debtor, whereas, a trustee is not and cannot properly be appointed until the court has first determined the issue relating to adjudication, and has either adjudicated the debtor insolvent, or in the cases coming under reorganization statutes, adjudicated the petition to have been properly filed and in good faith. In one case the action may be ex parte, whereas in the other it can take place only after a day in court has been afforded the debtor.

The receiver is never appointed except upon the motion of parties, nor is there preadjudication seizure of property except upon the motion of the petitioning parties, whereas, a trustee, is appointed in reorganization in the discretion of the court, and may be, and frequently is, appointed without motion of any party, as was done in this case.

In the third place, expenses of administration are not taxable against parties litigant where the administration creates a fund sufficient to satisfy such expenses. The record shows that the trustee in this case had on hand $18,004.11 (Tr. 68), and this was after payment on account of trustee fees and trustee's attorney fees, except the balance of $1750.00 directed to be paid by the order of September 21, 1943 (Tr. 15). These prior payments aggregated $2500.00 (Tr. 15). Therefore, the trustee had before payment of fees to himself or his attorney an aggregate of $20,504.11. The moneys held by Peer not accounted for, which had been derived from the rents, amounted to $7573.90 (Tr. 11). Therefore, the aggregate moneys in the estate at the time of the trustee's final report, before fees, amounted to $28,078.01. The trustee had received, when he took over the property from the prior custodian, the sum of $8598.62 (Tr. 67-68). According to his testimony he had paid all operating bills and all taxes that had been billed up to the time of his relinquishing possession. Therefore, his operation had resulted in an operating profit of a sum in excess of $19,000.00, and even without the moneys withheld by Peer amounted to approximately $12,000.00. In other words, after allowing for the payment of these fees there would still be a balance in favor of the company of approximately $15,000.00, net gain over the date on which the trustee took possession. Under such circumstances the expenses are taxable against the fund.

This court stated in *N. Y. Dock Co.* v. *Poznan,* 47 S. Ct. 482, 484; 274 U.S. 117, that

> "The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court, or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the

> court, should be paid from the fund as an 'expense of justice.' ***

and in *Warren, et al* v. *Palmer, et al,* 60 S. Ct. 865; 310 U. S. 132, this court said on page 868, Sup. Ct. Edition:

> "This court has held 'upon principles of general application' that courts having custody of property or a fund have the power 'to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it'. Such a power reposes in any court charged with custody of property. It is an *in rem* jurisdiction" **** "which is necessary in order that the court may adequately care for the property."

In Re Veler, 249 Fed. 633, C.C.A. 6, the court on page 641 discussed the cases where expenses of a receivership had been taxed against petitioning creditors and pointed out that they were cases where the receiver had never come into possession of the estate, or where there was no fund in court, excepting that which was the property of those who had always and successfully resisted the appointment of a receiver.

In the case of *Atlantic Trust Company* v. *Chapman,* 28 Sup. Ct. 406; 208 U. S. 360, this court discussed the question of whether expenses created by a receivership which exceeded the assets in the estate should be as to such excess taxed against the complainant on whose petition the receiver was appointed. There this court reversed the lower court decision in which the expenses had been taxed against the petitioner, holding that the receiver was appointed to hold for all parties in interest and was not for the complainant, was not under the control of the complainant, but was under the control of the court, and was exercising the power of the court; and that in the absence of the court's making it a con-

dition of his appointment, or of a contract to that effect or some special conditions which would make it equitable to do so, the complainant was not taxable with the expenses of the receivership.

This court further pointed out that cases in which such expenses had been taxed against the petitioners were cases in which there were special circumstances which made it equitable so to do. There are in this case no such special circumstances appearing. On the contrary, the circumstances of the petition having been filed in good faith and pursuant to a procedure sustained by two cases of the Circuit Court of Appeals, which that court found it necessary to expressly overrule in order to reverse this case, demonstrate that it would be definitely inequitable to saddle these petitioners with the expenses of the trustee.

In re Hurlburt Motors, 275 Fed. 62, the District Court for the Southern District of New York held that the receiver's compensation should come first out of the funds which he held in excess of what he had taken over, that is, the increment or profit derived during the receivership. Here there is a definite increment shown far in excess of the amount of these expenses, and by this rule expenses are payable from the estate.

VI.

Where a suit is dismissed solely for lack of jurisdiction in the District Court, that court is likewise without jurisdiction to tax costs.

We have heretofore considered the merits of the question of the taxing of the trustee's and trustee's attorney fees in which discussion we have assumed jurisdiction to the District Court to make such determinations.

There is, however, no such jurisdiction in the District Court. The mandate was to dismiss the proceeding for want of jurisdiction (Tr. 64). If the dismissal of the petition was the dismissal of the proceeding and the District Court so treated it, then there was no jurisdiction to tax costs other than the costs taxed by the Appellate court, which were incident to the appeal and those costs could be taxed only on a theory that while the District Court was without jurisdiction, the Appellate court did have jurisdiction to review the erroneous decision of the lower court, and, hence, to tax costs therefor.

The law seems to be well established that where a court has been held on review to be devoid of jurisdiction of a cause, it has no jurisdiction after reversal to tax costs.

In *Blacklock* v. *Small,* 127 U.S. 96, 8 Sup. Ct. 1096, 1099 this court in reversing the case which it stated should have been dismissed for want of jurisdiction taxed the costs in this court against the appellants, but ordered the dismissal in the Circuit Court for want of jurisdiction "without costs of that court."

In the case of *Citizens' Bank of Louisiana* v. *Cannon,* 17 Sup. Ct. 89, 90, 164 U.S. 319, this court considered the power of the Circuit Court to tax costs in a case dismissed for want of jurisdiction and said:

> "Having dismissed the bill for want of jurisdiction, the court was without power to decree the payment of costs and penalties."

In the earlier case of *Mayor* v. *Cooper,* 6 Wall, 250, 73 U.S. 851, 852 this court held that where the lower court had held it had no jurisdiction of the case, and yet gave a judgment for the costs of the motion, and

ordered that an execution should issue to collect same, it was clearly erroneous. The court said, "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."

This court stated that in such case the matter was *coram non judice,* and that "the award of costs and execution was consequently void. Such was the necessary result of the conclusions of the court."

In *Ingle* v. *Coolidge,* 2 Wheat. 363, 4 L. ed. 263 it was stated by the chief justice that "the court does not give costs where a cause is dismissed for want of jurisdiction."

In re Philadelphia & Lewes Transp. Co., 127 Fed. 896, the District Court applied this same rule to a bankruptcy proceeding.

In the case of *Humboldt Lovelock Irr. Light & Power Co.* v. *Smith,* 28 Fed. Supp. 421 D.C. Nev., a three judge court made recent application of this same rule saying, "Where the court has no jurisdiction it has no power to impose costs."

From these decisions, it seems clear to us that where proceedings are dismissed for want of jurisdiction all parties must seek their remedies for such damages as they have sustained, if any, in a plenary suit and cannot recoup expenses by summary action *coram non judice.*

It is noted that the petitioners in this case subscribed to this doctrine and wished to have this rule applied to the District Court with respect to its order of September 21, 1943 and they strongly urged, on page 19 of their argument, that no fees could be allowed to the trustee or his counsel, they having been appointed under a void order. On page 22, they take issue with the Ap-

pellate Court in the authority cited in support of the right of the court to modify a mandate previously issued. The argument is of no consequence, since the Appellate Court did not here modify the mandate, it merely stated that it would have modified it had it found it necessary. What the Appellate Court would have done under other circumstances, we believe, is no ground for granting certiorari. On pages 23 and 24 of their brief in support of the petition herein, petitioners reversed their position and there contended that the court could assess these fees of the trustee and his counsel against these respondents and that such order was valid and proper. Certainly the petitioners are seeking no accolade for consistency, when they, in one breath, say that the order of the court, allowing the fees and expenses, was void and without any jurisdiction, and in the next breath, allege that the order of the court assessing those very same fees, as costs against some of the parties, was a valid exercise of jurisdiction. Just how the court could have taxed these fees as costs against these respondents under what they claim was its valid jurisdiction without having first determined the amounts, exercising what they allege to be a lack of jurisdiction, they failed to explain. The fact is they stated the correct rule first and then departed from it when its application would not result in their advantage. The court was without jurisdiction to enter such an order and the Circuit Court of Appeals was exercising a valid and proper jurisdiction in reversing that part of the order which taxed these fees as costs.

On pages 26 and 27 of their brief, petitioners attack the order on Peer to turn over the moneys held by him after the reversal of the order appointing the trustee and contend that the Appellate Court erroneously sustained this order by assuming that money was collected

before the filing of the mandate. The court made no such assumption. Since the petition of the trustee for accounting by Peer was filed on the same day that the mandate was presented to the District judge, it is a fair conclusion, that at least some of these moneys were collected prior to that day. Inasmuch as the order of July 22, 1943 directed the Trustee to continue to collect the rents for August, pending the return of Judge Barnes on August 25th, it is a fair conclusion that some of the moneys found to be held by Peer were collected after the mandate (Tr. 9). The District Court found that the moneys collected were collected by Peer acting as an agent of the court's trustee; that is a finding of fact (Tr. 11012) which was binding on the Appellate Court and is binding on this court, since there is no evidence to the contrary. If these petitioners were in a position to controvert that finding of facts they should have done so by evidence presented to the District Court, and if not satisfied with the District Court's ruling thereon, should have made timely appeals therefrom. They are now asking this court to review and reverse both the Appellate and the District Court on a finding of facts which they neither appealed within the time nor supplied a record of contradiction thereto. Such is not a ground for certiorari. Whether or not the District Court was correct in its order of July 22, 1943, directing the trustee to continue collecting the rents for the month of August is now an academic question. It would, however, not be an improper exercise of its jurisdiction to settle its accounts for the District Court to order the continued conservation of the estate that it had in its possession until such time as the question of accounting, which was being contested by Peer, could be determined, and this is apparently all that the District Court did.

CONCLUSION.

Upon all the facts and the authorities applicable we conclude:

1. The District Court, if it had authority to fix the fees of the trustee and his counsel, was not in error in charging those fees to the estate in its order of September 21, 1943, there being a fund derived by the operation of the trustee far in excess of the amount of the fees allowed, and we further conclude that the petitioners are in error in their assumption, under their No. 1 on page 12 of their brief, that the proceeding was dismissed by the Appellate Court for lack of jurisdiction over the subject matter. The subject matter was bankruptcy, and there was no question of the jurisdiction of the District Court over the subject of bankruptcy. The question was whether there was a jurisdiction of parties, or whether there was any party respondent before the court.

2. We conclude that where a trustee has been appointed in a bankruptcy reorganization proceedings, after adjudication of the petition as properly filed under Chapter X of the Bankruptcy Act, and where there was no preadjudication seizure of property, or appointment of receiver, the expenses of the preservation of the estate and operation of the business are not taxable as costs to the petitioning creditors.

3. Where there is a dismissal of a proceeding for lack of jurisdiction directed by a Court of Appeals after a holding of jurisdiction below, the court below may enter orders that may be necessary or proper to divest itself of the property and funds it has taken and in doing so may require an accounting of its officers or agents, but may not adjudicate any new matter in the proceeding.

4. The petitioner's assignment No. 3 is academic, inasmuch as the Appellate Court did not modify its mandate in the prior case, but only construed it.

5. While the District Court may have been without jurisdiction to allow fees to the trustee and to the trustee's counsel, where the case failed for want of jurisdiction, neither the Court of Appeals nor this court could properly reverse the order of the District Court in doing so without process running to parties in interest, that is, the trustee and his counsel. The petition herein seeks to have that order reversed by ex parte proceedings. The trustee and his counsel being the only parties respondent to that part of the petition not being before this court.

6. The mandate of the Circuit Court of Appeals gave no authority to the District Court to assess costs against the "petitioning creditors," and particularly gave no direction to single out some of the petitioning creditors as against others included in the mandate without distinction, and the court was without any authority, or jurisdiction to enter the order taxing these fees as costs to these respondents.

7. We have found no question of law involved herein not already well settled by existing authorities, nor have we found any question of law involved on which there is a conflict of existing authorities, hence we respectfully submit that the petition for certiorari ought to be denied in this cause.

Respectfully submitted,

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(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 405-6

IN THE MATTER OF

PEER MANOR BUILDING CORPORATION,
Debtor.

J. MARSHALL PEER AND W. D. WITTER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC., AND HARRY FOOTE, ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

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PRELIMINARY STATEMENT.

Respondents' statement (p. 6) that they "alone" appealed from the Order which allowed the fees to the Trustee and his counsel is refuted by the record showing (R. 16-17) that the petitioner, Peer, appealed from that Order.

The other statement that the Trustee and his counsel were not respondents below nor respondents here is not supported by any reference to the record. Rule 73 (b) requires the Clerk to mail copies of the Notice of Appeal to the respective parties and it must be presumed that the Clerk performed his duty and that the Court of Appeals, in deciding the issues, (143 F. (2d) 764) had all the parties before it, and failure of a party to appear after being served with Notice of Appeal does not affect the validity of appeal.

I.

The Order of July 22, 1943 Was in Violation of the Mandate.

Only with eyes of respondents can they read in the mandate directing the dismissal of the proceedings for want of jurisdiction the words contained in the Order of July 22, 1943 (R. 9) directing the tenants to pay the future rent to the Trustee whose appointment was vacated by the mandate. After *conceding* (p. 7) that the District Court had "no right to adjudicate any new matter," they attempt to sustain an Order which dealt with new matter. Respondents concede that the District Court was powerless to decide additional and new matters subsequent to the filing of the mandate but they seek to give the impression that the Order directing Peer to turn over the rents related to rents collected *before* the filing of the mandate. This is *contrary* to the record, which shows that a mandate was filed June 28, 1943, and the Petition of the Trustee was filed July 9, 1943, and the Petition sought rents collected *subsequent* to June 28, and commencing with July 1, 1943. The Order appealed from directed Peer to return the rents collected *from July 1 to August 21, 1943,* which were *subsequent* to the filing of the mandate. For this

reason, the statement of the respondents that "when the mandate was presented on July 9, 1943, Peer already held monies he had collected as agent of the Trustee" is inaccurate because the mandate was not presented July 9, but was filed of record June 28, and the rent was collected after the Trustee was ousted by the self-executing Order of the mandate vacating his appointment.

II.

The Order of August 25, 1943, Was Appealed.

We assume that the heading under Point II of respondents' Brief (p. 8) of "July 25, 1943" is a clerical error and that the words "August 25, 1943" are intended. No contention was made below that no appeal was taken from this Order. The Petition for Certiorari is not directed to the District Court but to the Court of Appeals which affirmed the Order of August 25, 1943, and this point is not available to the respondents, even if it were true. However, the record contradicts their statement that no appeal was taken from that Order. This Order was based on the Petition of the Trustee and the Answer of Peer (R. 11) and on the same day when this Order was entered, another Order was entered *continuing* the Motion to Vacate Paragraphs 2, 3 and 4 of the Order entered July 22, 1943 (R. 12). This Order was the *basis* for the Petition and Answer which was determined by the Order of August 25, 1943, which Motion was continued to September 7, 1943 (R. 12) and by other continuances was *finally* disposed of on September 21, 1943 (R. 15). This Order was the final Order as to the payment of the fees, and as to the trustee's right to the July and August rents from which Order the appeal was taken on October 19, 1943 (R. 16) and the appeal was, therefore, timely.